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In The

Supreme Court of the United States

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

v.

U.S. PHONE MANUFACTURING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the longstanding jurisprudence of Puerto Rico, a provision in an arbitration agreement requiring that an arbitration must be "in accordance with law" is construed to reflect the parties' agreement to full judicial review of arbitral awards on questions of law. The First Circuit refused to give force and effect to this principle, holding that this Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), preempts a departure from the default rules set forth in Sections 10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11, which strictly limit the judicial review of arbitral awards, notwithstanding the plain meaning of the contractual language under Puerto Rico law.

The question presented is whether the FAA pre-empts the rights of parties seeking to invoke state-law arbitration principles to opt out of FAA's more restrictive judicial review regime in this setting.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Puerto Rico Telephone Company ("PRTC") is a wholly owned subsidiary of Telecomunicaciones de Puerto Rico, Inc. ("TELPRI"). TELPRI is owned by Verizon Communications (52.1%), PRTA Holdings Corp. (28%), Popular Inc. (12.9%), and PRTC's employees (7%). PRTA Holdings Corp. is wholly owned by the government of the Commonwealth of Puerto Rico. In 1987, PRTC was wholly owned by the government of the Commonwealth of Puerto Rico. Respondent U.S. Phone Manufacturing Corporation ("U.S. Phone") is an independent corporate entity. No publicly held company owns 10% or more of the stock of U.S. Phone.

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PETITION FOR WRIT OF CERTIORARI

PRTC respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 427 F.3d 21. Appendix ("App.") 1.

The Opinions and Orders of the United States District Court for the District of Puerto Rico are unpublished. App. 24, 28.

The arbitration award is unpublished. App. 32.

JURISDICTION

The opinion of the First Circuit was issued on October 14, 2005. App. 1. On December 29, 2005, Justice Souter enlarged the time to petition for a writ of certiorari to and including February 10, 2006 (No. 05A579). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case involves provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Section 10, 9 U.S.C. § 10, states:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating

> the award upon the application of any party to the arbitration –
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.
>
> (c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Section 11 of the FAA, 9 U.S.C. § 11, states:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting

the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

A. Introduction

This case presents a matter of great importance to the Commonwealth of Puerto Rico and its business community. It also presents a set of related issues that have confounded the lower courts for a decade or more. The current state of the law creates uncertainty over whether the intentions of contracting parties to depart from the FAA's default rules of judicial review will be honored by the courts.

The First Circuit was asked to determine the availability and scope of judicial review of an arbitral award. In answering the questions posed by this case, the court of appeals navigated between this Court's decisions in

Mastrobuono and *Volt Information Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), to uncover a chimera-like rule that serves neither the purposes of the FAA, nor the rights of those who seek to resolve their disputes by arbitration. Commentators have called for additional enlightenment in this important area of arbitration law.[1] This case is an appropriate vehicle for that review.

B. Factual Background

On July 8, 1987, PRTC requested bids for a five-year procurement contract for the purchase of memory telephones to replace older, outdated telephones for residential use. The bid proposal did not specify the number of telephones to be purchased each year, but PRTC estimated that it would purchase 25,000 telephones annually based on its current consumer demand. On February 10, 1988, PRTC awarded the bid jointly to U.S. Phone and two other companies.

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[1] *See e.g.*, Milana Koptsiovsky, "A Right to Contract for Judicial Review of an Arbitration Award: Does Freedom of Contract Apply to Arbitration Agreements," 36 CONN. L. REV. 609 (2004); Jonathan R. Bunch, "Arbitration Clauses Should be Enforced According to Their Terms – Except When They Shouldn't Be: The Ninth Circuit Limits Parties' Ability to Contract for Standards of Review of Arbitration Awards," 2004 J. DISP. RESOL. 461 (2005); Anthony J. Longo, "Agreeing To Disagree: A Balanced Solution to Whether Parties May Contract for Expanded Judicial Review Beyond the FAA," 36 J.MARSHALL L.REV. 1005 (2003); Lee Goldman, "Contractually Expanded Review of Arbitration Awards," 8 HARV. NEGOT. L.REV. 171 (2003); Note, "An Unnecessary Choice of Law: *Volt, Mastrobuono*, and Federal Arbitration Act Preemption," 115 HARV. L.REV. 2250 (2002).

In 1988, PRTC issued purchase orders for approximately 23,000 telephones from U.S. Phone. In 1989, PRTC issued purchase orders for approximately 48,000 telephones. By 1990, however, PRTC had a sufficient number of telephones in stock to fill demand for the next two years and therefore, PRTC did not order any new telephones that year. In September 1992, PRTC informed U.S. Phone and the two other suppliers that it was terminating the contract.

Dissatisfied with the cancellation, U.S. Phone sought arbitration pursuant to the terms of the parties' agreement. In the contract, the parties had agreed to resolve any dispute by arbitration if informal settlement efforts failed. The contract provided:

> CLAUSE 17 ARBITRATION
>
> 17.1 Arbitration
>
> Any difference or disputes arising out of or in connection with the execution of this Contract shall be settled by an amicable effort of both Parties. An attempt to arrive at a settlement shall be deemed to have failed as soon as one of the Parties so notifies the other Party in writing.
>
> 17.2 Arbitration Panel
>
> If an attempt at settlement has failed, the disputes shall be finally settled under the Rules of Conciliation and Arbitration of the American Arbitration Association. . . . The panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico.

> 17.3 Judgment
>
> The arbitral award shall be substantiated in writing and the findings shall be final and binding for both parties. This arbitration procedure shall be a condition precedent to any right of legal action. . . .

The contract also contained an additional provision, standard in contracts in Puerto Rico, specifying that the contract would be interpreted in accordance with Puerto Rico law:

> CLAUSE 4 LANGUAGE AND LAW
>
> (a) This Contract is drawn up in the English language, which shall govern and shall be designated as the "Ruling Language".
>
> (b) This Contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico.

This "in accordance with the laws" language has specialized meaning in Puerto Rico. Under Puerto Rico law, an arbitration award may be subject to *de novo* judicial review "on matters of law only if the parties agree that the controversy submitted to the arbitrator must be settled in accordance with the law. . . ." *Febus v. MARPE Constr. Corp.*, 135 D.P.R. 206, 1994 JTS 19 (P.R. 1994), *quoting J.R.T. v. Corp. Crédito Agrícola*, 124 D.P.R. 846, 849 (P.R. 1989). *See also Labor Relations Bd. of P.R. v. Farm Credit Corp.*, No. JR-89-42 (P.R. 1989).

After various procedural disputes were resolved, the arbitration began in June 1997, and lasted ten days. The hearings disclosed, among other things, that U.S. Phone had breached its obligation under the contract to provide

telephones that complied with the labeling and registration requirements of the Federal Communications Commission. Under Puerto Rico law, such a breach precludes recovery of damages by U.S. Phone. Despite this breach, on March 4, 2003, the arbitration panel issued an award directing PRTC to pay U.S. Phone $2,552,123.99 in damages. App. 32.

C. The Decisions Below

PRTC sought review of the arbitrators' decision in the United States District Court for the District of Puerto Rico, invoking Clause 4(b) of the contract. On March 9, 2004, the district court declined to review the arbitral award under Puerto Rico law. App. 28. The court ignored altogether the terms of the contract between the parties and the standard of review under Puerto Rico law. Instead, the court looked exclusively to Sections 10 and 11 of the FAA to determine that review was "nearly impervious to judicial oversight" and allowed only in cases of corruption, serious error, misconduct and miscalculation. App. 30, *quoting Teamsters Local Union No. 42 v. Supervalu, Inc.*, 212 F.3d 59, 61 (1st Cir. 2000). On October 6, 2004, the district court confirmed the arbitral award. App. 27.

PRTC appealed to the First Circuit. PRTC asked the court to resolve whether the district court correctly had looked only to the FAA to determine the scope of review, while ignoring the well established principle of the law of Puerto Rico allowing the judicial review of questions of law if the arbitration agreement directs the arbitrators to ensure that their decision is made "in accordance with law."

On October 14, 2005, the court of appeals affirmed the district court's decision. App. 1. The appeals court recognized that it was required to reconcile competing federal and state laws concerning the standard of review that should apply to the arbitral award. The court noted that this Court had considered a similar choice of law issue in two prior cases, *Mastrobuono*, 514 U.S. 52, and *Volt*, 489 U.S. 468, with different outcomes.

In *Volt*, the Court considered a contract for the construction of electrical conduits on the Stanford campus. The contract included an agreement to arbitrate disputes and additionally stated the contract would be governed by the "law of the place where the project is located," in that case, California. A dispute arose over whether the arbitration could be stayed pending a resolution of related litigation involving third parties who were not bound by the arbitration agreement. Although the FAA is silent with respect to stays of arbitration, California rules of arbitration permit such a stay. This Court held that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." The Court determined that the application of the California provision was not pre-empted by the FAA because that provision did not disfavor arbitration. The Court therefore upheld the parties' choice-of-law clause and concluded that state rules governing the conduct of the arbitration applied even though they differed from the rules that applied under the FAA. 489 U.S. at 476.

In *Mastrobuono*, this Court considered a choice-of-law provision in a securities trading account contract between Shearson Lehman Hutton, Inc. and the Mastrobuonos, two

unsophisticated investors. The contract contained an arbitration agreement and also specified that the agreement was to be "governed by the laws of the State of New York. *See* 514 U.S. at 58-59 & n.2. A dispute arose and the arbitrator awarded both compensatory and punitive damages to the Mastrobuonos, but New York precedent establishes that only a court can award punitive damages. This Court held that the application of state law was preempted by the FAA because it restricted the type of relief available in the arbitration. The Court decided that the "best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators." *Mastrobuono*, 514 U.S. at 63-64.

The court of appeals decided that this case was closer to *Mastrobuono* than to *Volt*. It held that neither the generic choice-of-law provisions in the arbitration clause nor the specific choice-of-law provision requiring compliance with Puerto Rico law was sufficient to supplant the review provisions of the FAA. The court plainly conflated the two choice-of-law provisions, mis-cited those provisions, and accorded no legal significance to the presence of two linguistically different provisions in the parties' contract. *See* App. 15, 16. According to the court, a choice-of-law provision standing alone cannot override the FAA policy favoring final resolution of disputes by arbitration. By permitting more searching judicial review, the Puerto Rico review standard embodied in the parties' agreement limited the authority of arbitrators. The court held that "the FAA creates a presumption that the more limited FAA standard will govern, and the language here, as a matter

of federal law, is insufficient to overcome the presumption." App. 16. Thus although the court agreed that parties can contract to displace the FAA standard of review, the court decided that "displacement can be achieved only by clear contractual language." The court held that "[t]he contract here, even if sufficient under Puerto Rican law, is far short of the explicit language required by federal law to displace the FAA standard of review." App. 19.

REASONS FOR GRANTING THE PETITION

A. There Is a Conflict Among the Circuits on Whether the FAA's Default Review Standard Can Be Displaced by the Parties' Arbitration Agreement

1. Where, as here, a contract includes two choice-of-law provisions, one, a so-called generic choice-of-law clause and the other, invoking a longstanding convention in the law of Puerto Rico that is understood to allow full judicial review of arbitral awards on questions of law only, three questions require resolution.

First, may the parties to the arbitration agreement displace the review provisions of the FAA by agreeing to a more expansive standard of review. Second, if displacement by contract is permissible, may the parties obtain judicial review of arbitral awards on the merits, notwithstanding the limitation on review contained in Sections 10 and 11 of the FAA, 9 U.S.C. §§ 10, 11, by their agreement to apply a particular state's law that authorizes such review of an award. Finally, what legal standards and criteria should be invoked to determine whether expanded

judicial review is appropriate under the arbitration contract agreed to by the parties.

The answers to these questions are confounded by circuit disagreements, confusing precedents in this Court's jurisprudence and the absence of comprehensive standards to be applied by the lower courts for deciding whether parties have succeeded in displacing the limited opportunities for judicial review in Sections 10 and 11 of the FAA. This fairly cluttered landscape would benefit from further review by and guidance from this Court. There is no doubt that PRTC expected expanded judicial review if an arbitration became necessary under its contract with U.S. Phone. PRTC had valid reason to expect expanded review because the parties' contract included language that has traditionally been construed to permit such review under Puerto Rico law.

2. This Court has held:

> While the FAA . . . pre-empts application of state laws which render arbitration agreements unenforceable, "[i]t does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their [arbitration] agreement to abide by state rules." To the contrary, . . . the parties to an arbitration agreement should be "at liberty to choose the terms under which they will arbitrate."

Volt, 489 U.S. at 472, *quoting Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985). *Volt* holds further that where a state's law applies, the state's substantive and arbitral law may be applied so long as doing so will not "render the arbitration agreement unenforceable." *Id.*

Mastrobuono does not disturb *Volt's* holding and in fact, plainly reaffirms it. *Mastrobuono*, 514 U.S. at 56-57. Although *Mastrobuono* has been construed to adopt a variety of broad principles favoring pre-emption of state laws addressing arbitration, the holding of *Mastrobuono* seems far narrower.[2] As a matter of New York contract law, which applied in *Mastrobuono*, the arbitration agreement could not be interpreted to preclude an award of punitive damages and the Court rejected Shearson Lehman's theory of the case principally for that reason. While the Court surely emphasized the FAA's pro-arbitration objective and questioned the significance of choice-of-law clauses generally as an important factor in the interpretation of arbitration agreements, it seems that the First Circuit and other courts have attributed far greater and perhaps undeserved force to *Mastrobuono*. Many lower courts hold that *Mastrobuono* limits or precludes reliance on any choice-of-law provision in an arbitration agreement to authorize the expanded judicial review of arbitral awards beyond the provisions of Sections 10 and 11 of the FAA.

The apparent over-reading of *Mastrobuono* is unwarranted and undermines the FAA's pro-arbitration objectives. This evolution merits further consideration by this Court. The decision has caused "confusion [that] has produced a morass of inconsistent principles, expanding FAA preemption into areas traditionally reserved for the states, and departing from Congress's intent to place arbitration agreements on 'equal footing' with all other contracts." Note, *supra* n.1, 115 HARV. L.REV. at 2260.

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[2] *See* Note, *supra* n.1, 115 HARV. L.REV. at 2260-68.

3. This Court has focused the holding of *Mastrobuono* more specifically on whether the state law provision "undermine[s] the goals and policies of the FAA." *Doctors Assoc., Inc. v. Casaratto*, 517 U.S. 681, 685 (1996). A court should evaluate the impact of state contract law on arbitration with a view toward honoring the FAA's purposes and objectives. This analysis seems to bring more confusion than enlightenment since the relative importance of doctrinal principles in tension may be mostly in the eye of the beholder, and it lacks the flexibility that might best serve those principles.

As the tension between *Volt* and *Mastrobuono* continues to build, it is apparent that the lower courts disagree over whether and by what devices parties may rely upon generic, or not so generic, choice-of-law provisions in arbitration agreements as evidence of an intent to contract out of Sections 10 and 11 of the FAA. While the court below followed the apparent majority rule that expanded judicial review is a possibility if stated in no uncertain or unambiguous terms, App. 19, other courts have refused to allow it. For example, the Tenth Circuit will not allow any agreed-upon expanded review:

> [E]xpanded judicial review would threaten the dependence of arbitration and weaken the distinction between arbitration and adjudication. Arbitrators are chosen for their specialized experience and knowledge, . . . Expanded judicial review therefore . . . reduces arbitrators' willingness to create particularized solutions for fear the decision will be vacated by a reviewing court.

Bowen v. Amoco Pipeline Co., 254 F.3d 925, 936 (10th Cir. 2001) (footnote omitted).

The Ninth Circuit also holds that parties may not contract for expanded review. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc), and decisions of the Seventh and Eighth have been construed to do so as well. *See UHC Mgmt. Co. v. Computer Servs. Corp.*, 148 F.3d 992, 996-97 (8th Cir. 1998); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991).[3] The Ninth Circuit also has held that *Volt* (allowing expanded review in keeping with a choice-of-law provision) applies only to state arbitral awards and *Mastrobuono* (construed as not allowing expanded review) applies to federal arbitrations. *Chevron Corp. v. Ortho Diagnostic Sys. Inc.*, 207 F.3d 1126, 1130-31 (9th Cir. 2000).

Relying on this Court's observation that the FAA was intended to give force to the rights of parties to agree to the terms under which they arbitrate disputes, the majority rule allows parties to contract for expanded judicial review but only if it is expressly provided for in some detail. A generic choice-of-law clause will not suffice. *Jacada Ltd. v. Internat'l Marketing Strategies*, 401 F.3d 701, 711 (6th Cir. 2005) ("[I]n light of the Supreme Court's reading of a similar agreement in *Mastrobuono*, we . . . do not believe that the parties intended to displace the federal standard for vacatur when the only evidence of

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[3] In *Kyocera*, the Ninth Circuit suggested that the Eighth Circuit was sympathetic to its holding that "private parties have no power to determine the rules by which federal courts proceed." 341 F.3d at 999-1000 (citing *UHC Mgmt.*). But the Eighth Circuit, in a subsequent decision, *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8th Cir. 2003), *cert. denied*, 540 U.S. 1180 (2004), appears to have aligned itself with the courts that will enforce parties' agreements to expanded review (at with the Ninth Circuit's pre-*Kyocera* jurisprudence). 341 F.3d at 789-90.

such intent is a generic choice-of-law provision."). In *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 289, 297 (3d Cir. 2001), the Third Circuit joined the ranks of those courts which have rejected generic choice-of-law provisions as justification to opt out of the FAA default rule. *See id.* at 295-97 (collecting authorities pro and con); *see also id.* at 301 (Judge Ambro, concurring). The *Roadway* opinion, like the opinion of the First Circuit here, gives the impression that a choice-of-law clause that could be deemed "generic" whatever that might mean, would never be sufficient to reflect a clear enough intent to merit a departure from the FAA's default rules. Relying on *Mastrobuono*'s observation that choice-of-law rules are not much more than a substitution for a conflict-of-laws analysis, the *Roadway* majority observes that drafters of choice-of-law provisions probably never had an intent to do more than resolve the conflicts question. *Roadway*, 257 F.3d at 289. Where, however, the arbitration agreement expressly provides for judicial review of questions of law, the expanded review agreed to by the parties will be honored. *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 996 (5th Cir. 1995) (citing *Mastrobuono* and *Volt*). It is not clear whether this obvious outcome would be embraced in those circuits that apply an absolute preemption rule. *See supra*, pp. 13-14.

As the lower courts struggle with the *Mastrobuono/Volt* puzzle, they are all quite confident that they have mastered the true path, but that is far from clear in their opinions or from the contributions to legal literature inspired by the continuing inability of courts and

commentators to reach a common understanding.[4] This may be an expected consequence of the convergence of too many conflicting and equally valid principles needing a more rational and flexible format for prioritization. It surely flows to some degree from a healthy judicial respect for preemption and the difficulty naturally encountered when courts try to come to terms with a federal law that probably allows private parties to reject it. And the analysis is all the more difficult because in each case, the reviewing court needs not only to apply the appropriate contract law to discern the meaning of the parties but also may need to conduct a particularly searching review to explore the most likely intent of the drafters. The simple solution is to require drafters to draft clear agreements that leave no doubt about the intent of the drafters and consent of the parties generally; PRTC thought it had done that. The *Gateway* approach, expressly providing for expanded review, is the ideal solution. But, in thousands of other circumstances, and without doubt in a multitude of arbitration agreements entered into in Puerto Rico or with parties from the business community and Government of Puerto Rico, even that approach would upset clear expectations.

Consideration of these issues by this Court surely would improve uniformity. It also would free the lower courts from inflexible approaches that now preclude them

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[4] *See e.g.*, Thomas A. Diamond, "Choice of Law Clauses and Their Preemptive Effect Upon the Federal Arbitration Act: Reconciling the Supreme Court with Itself," 39 ARIZONA L.REV. 35, 56-58 (1997); Heather J. Haase, "Note: In Defense of Parties' Rights to Limit Arbitral Awards Under the Federal Arbitration Act: *Mastrobuono v. Shearson Lehman Hutton, Inc.*," 31 WAKE FOREST L.REV. 309, 331-32 (1996).

from honoring the legitimate expectations of many parties to arbitration agreements.

B. This Is an Appropriate Case for Consideration of These Questions

This case provides an appropriate setting for reconciling *Volt, Mastrobuono* and the substantial array of opinions attempting to explain what the Court meant in these leading cases.

First, this case is not a generic choice-of-law case and therefore should not fall victim to the tyranny of the widespread choice-of-law bias. A generic choice-of-law provision "standing alone" may not be enough to avoid the default.[5] *See Roadway Package Sys.*, 257 F.3d at 297. But the choice-of-law provision in the agreement between PRTC and U.S. Phone does not stand alone. There are, in fact, two provisions which were incorrectly treated as restatements of each other by the First Circuit.

Clause 17.2 of the Arbitration Agreement provides: "The panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico." This is the conflict of laws provision or generic choice of law. Clause 4(b) of the Agreement provides: "This contract shall be governed by

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[5] That conclusion, however, is not an absolute. If the state law rule, even an arbitration rule, does not conflict with the FAA or might be considered pro-arbitration, there would be no reason to deny its application. *See Volt*, 489 U.S. at 476, *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Lower court inconsistencies in deciding questions of expanded judicial review ordinarily would merit far more extensive explication here. The commentators, however, have already done the job more persuasively and comprehensively than could be accomplished in the space allowed. *See supra* n.1.

and interpreted in accordance with the laws of the Commonwealth of Puerto Rico."

Under longstanding jurisprudence of the Supreme Court of Puerto Rico, the inclusion of language like that in Clause 4(b) has been construed to mean that expanded judicial review of arbitral awards is available to the parties to ensure compliance with the law of Puerto Rico.

> [A]n award based on the parties' voluntary submission is subject to judicial review only if the parties agree that the controversy submitted to the arbitrator must be settled in accordance with the law. . . . Absent an express provision to such effect, an award may be challenged only if it is shown that it involves fraud, misconduct of the arbitrator, lack of due process of law, lack of jurisdiction, failure to resolve all the matters in dispute, or that it is contrary to public policy.

Febus v. MARPE Constr. Corp., 135 D.P.R. 206, *quoting J.R.T. v. Corp. Crédito Agricola*, 124 D.P.R. at 849. This principle is well established in Puerto Rico law. *E.g., Labor Relations Bd. of P.R. v. Farm Credit Corp.*, No. JR-89-42 ("an award based on the parties' voluntary submission is subject to judicial review only if the parties agree that the controversy submitted to the arbitrator must be settled in accordance with the law.") (citations omitted); *Puerto Rico Labor Relations Bd. v. Administrative Bd. of the Ponce Mun. Pier*, 122 P.R. Offic. Trans. 303, 310 (P.R. 1988) (an arbitration award is subject to judicial review if the contract "expressly provides that the award should be conformable to law, and this referring to the [applicable law]") (citations omitted); *Union de la Industria Licorera de Ponce v. Destileria Serrallés, Inc.*, 116 P.R. Offic. Trans. 426, 432 (P.R. 1985) (where "agreement expressly provided

that the arbitrator's award . . . had to conform to law" a party can seek judicial review of the "legal validity of the award") (citations and emphasis omitted); *Rivera v. Samaritano & Co., Inc.*, 8 P.R. Offic. Trans. 640, 644 (P.R. 1979) (if the agreement provides "that matters submitted to arbitration are to be settled according to law, the court is empowered to review the juridical merits of the award"); *S.I.U. de Puerto Rico v. Otis Elevator Co.*, 105 P.R. Offic. Trans. 1156, 1163 (P.R. 1977) (judicial review of an arbitration award is permitted where the agreement "expressly provides that the award should be conformable to law, and this referring to the law applied therein") (citation omitted).[6]

The First Circuit paid little attention to the presence of the two choice-of-law rules; it simply confused them. The court of appeals considered Clause 4(b) to be a generic choice-of-law provision and found it insufficient to support expanded judicial review "standing alone." App. 14-15. That clause does not, however, stand alone and was not the generic choice-of-law provision which appears in Clause 17.2.

Under a heading captioned, "Effect of Other Provisions," the First Circuit once again turned to Clause 4(b) and the body of Puerto Rico law endowing the language in the clause with special meaning and an expression of intent to permit expanded judicial review. The court was unimpressed, holding that the "FAA creates a presumption

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[6] Although the exception to the general rule of deferential judicial review has its roots in arbitration of labor-management disputes, *see Labor Relations Bd. of P.R. v. Farm Credit Corp.*, No. JR-89-42 (P.R. 1989), it is now of general application and governs commercial disputes as well. *See e.g., Febus*, 135 D.P.R. 206.

that the more limited FAA standard will govern, and the language here as a matter of federal law is insufficient to overcome the presumption." App. 16.[7]

The First Circuit's analysis is muddled by its failure to address the fact that there are two choice-of-law provisions, and by its failure to explain why the inclusion in Clause 4(b) of particular language that is treated as a term of art in Puerto Rico, expressing an intent to permit expanded review, is not sufficient to overcome the presumption, if such a presumption exists. This cannot be consistent with the doctrinal objective of effectuating the intent of the parties, and it is not so obviously required by the *Moses H. Cone* pre-emption analysis, which requires a resolution of doubts or ambiguities in language in favor of the FAA's default rules. *Moses H. Cone*, 460 U.S. at 24-25. The presumption approach applied here also fails to account for the two very distinct choice-of-law provisions in the arbitration agreement.

Next, the parties to the case both are sophisticated corporate entities that have some responsibility to know the law to which they have agreed in their contract. Moreover, the presence of the two choice-of-law provisions in this context diminishes the likelihood that the drafters of the agreement had no particular intent to include the Puerto Rico rule allowing judicial review of questions of law. Indeed, it is hard to think of an alternative explanation for the two provisions.

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[7] The presumption idea is first mentioned in *Roadway*, 257 F.3d at 294. It may reflect a natural evolution of the holding of this Court in *Moses H. Cone* disfavoring ambiguous language suggesting a departure from the FAA's default position.

Finally, it is difficult to pigeonhole the Puerto Rico rule as either pro- or anti-arbitration. Expanded review is a common feature of the arbitration law of Puerto Rico and it does not obviously undermine the FAA simply because it departs from the narrow review provision of Sections 10 and 11 of the FAA. If it is the quid pro quo that encourages the business and governmental communities in Puerto Rico to arbitrate with their chosen level of comfort, it is a pro-arbitration provision. It is not ambiguous in light of the law of Puerto Rico and it does not unduly burden the arbitration process if this is how the Puerto Rico community wants to structure its arbitration regime.

The court below was wrong to impose an inflexible "generic choice-of-law provision standing alone" rule and wrong to conclude that *Mastrobuono* required it to do so.

C. The Issues Presented Are Important and Recurring Questions That Merit This Court's Attention

This case is enormously important to the Commonwealth of Puerto Rico. Arbitration agreements common in Puerto Rico's business and governmental communities often embody these clauses and the clauses have been construed by the Supreme Court of Puerto Rico to allow for expanded review of arbitration awards on questions of law.[8] The great importance of this case to the Commonwealth should merit review by itself.

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[8] There are, of course, times when there is no bright line between questions of law and questions of fact and if the distinction becomes too blurred, expanded judicial review might not serve the pro-arbitration objectives of the FAA. In any case, that pitfall must be avoided by strict adherence to the reviewing court's scope of review. Here, the legal

(Continued on following page)

There is much more that can be accomplished however. In the eleven years since this Court decided *Mastrobuono*, courts and commentators continue to follow divergent paths in search of a better set of rules. Arbitration agreements continue to be an increasingly popular alternative to litigation. Better and less confusing rules should make the arbitration alternative even more desirable. The FAA surely reflects Congress's expectation that this Court will take the lead in refining and improving the rules. There is a clear opportunity to do so in this case.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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questions are clearly defined. PRTC alleged that specific acts committed by U.S. Phone constituted a breach of contract as a matter of law. The law of Puerto Rico then prescribes the consequences of that breach.

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United States Court of Appeals
For the First Circuit

Nos. 04-2601, 04-2602

PUERTO RICO TELEPHONE COMPANY, INC.,
as Liquidator on behalf of
Reliance Insurance Co. (in liquidation),

Plaintiff, Appellant/Cross-Appellee,

v.

U.S. PHONE MANUFACTURING CORPORATION,

Defendant, Appellee/Cross-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Jaime Pieras, Jr., *Senior U.S. District Judge*]

Before
Torruella, Dyk[1], and Howard, *Circuit Judges*.

Jesús E. Cuza, with whom *Elliot H. Scherker*, *Pamela A. DeBooth*, and *Greenberg Traurig, P.A.*, were on brief, for appellant/cross-appellee Puerto Rico Telephone Company.

Pedro Jiménez Rodriguez, with whom *Adsuar Muñiz Goyco & Besosa, P.S.C.*, was on brief, for appellee/cross-appellant U.S. Phone Manufacturing Corporation.

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[1] Of the Federal Circuit, sitting by designation.

October 14, 2005

DYK, *Circuit Judge.* Puerto Rico Telephone Company, Inc. ("PRTC") appeals from the district court's denial of its motion to vacate and entry of judgment confirming an arbitral award. The award granted $2.5 million in damages to U.S. Phone Manufacturing Corp. ("USPhone") for breach of contract. At issue is whether and how parties can contract for standards of judicial review of arbitration awards other than those set forth in the Federal Arbitration Act ("FAA" or "Act"). 9 U.S.C. §§ 10, 11 (2000).

We hold that the judicial review provisions of the FAA can be displaced only by explicit contractual language evincing the parties' clear intent to subject the arbitration award to a different standard of review. Here, no such clear statement was contained in the contract. Under the proper review standard set forth in the FAA there were no grounds for vacating the award. We accordingly affirm the district court. On the cross-appeal by USPhone, we also affirm the district court's decision to deny an award of attorneys' fees to USPhone.

I.

The present dispute had its genesis in 1987, when PRTC solicited bids to procure telephones for its residential customers over a five-year period. USPhone was awarded the bid, jointly with two other companies, on February 10, 1988. On December 2, 1988, PRTC and USPhone executed a requirements contract under which USPhone agreed to supply PRTC's five-year requirements of residential memory telephones, estimated at 25,000 per year ("the contract"). The contract was drafted by PRTC.

Clause 4 of the contract, titled "Language and Law," contained a provision stating that "[t]his Contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico."[2] Clause 17, titled "Arbitration", stated, in pertinent part:

> 17.2 Arbitration Panel
>
> If an attempt at settlement has failed, *the disputes shall be finally settled* under the Rules of Conciliation and Arbitration of the American Arbitration Association.
>
> Each Party shall appoint a member to a three-person panel. The two members so appointed shall within twenty (20) days agree upon a third member who shall be a jurist and chair the panel. If the two members fail to appoint the third member within thirty (30) days, he will be appointed by the President of the American Arbitration Association. *The panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico.*
>
> 17.3 Judgment
>
> The arbitral award shall be substantiated in writing and the findings *shall be final and binding for both parties.* This arbitration procedure shall be a condition precedent to any right of legal action. The panel shall decide on the matter of costs of the arbitration.

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[2] Clause 4 also stated "[t]his Contract is drawn up in the English language, which shall govern and shall be designated as the 'Ruling Language.'"

During the course of performance, various disputes arose between the parties, which they were unable to resolve. The contract was eventually terminated by PRTC, pursuant to the contract's termination clause, effective January 2, 1993. On September 13, 1993, USPhone commenced arbitration against PRTC, before the American Arbitration Association ("AAA"). Three years later, following various procedural skirmishes regarding the choice of a neutral arbitrator, the United States District Court for the District of Puerto Rico ordered the parties to proceed to arbitration. *U.S. Phone Mfg. Corp.* v. *P.R. Tel. Co.*, Civ. No. 96-1265CCC, slip op. at 5 (D.P.R. Sept. 30, 1996).

An AAA panel was convened in June 1997 and spent over two years considering the matter. More than a decade after the initial request for arbitration, on March 4, 2003, a unanimous panel awarded USPhone $2,552,123.99 in damages basing its decision on a record including "approximately 10 days of testimony . . . 1900 pages of transcripts, and approximately 175 exhibits, including physical evidence, as well as documents comprising approximately 1700 pages." As is common in arbitration awards, the arbitrators' decision contained no discussion of the arbitrators' reasoning. *See, e.g.*, *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 8 (1st Cir. 1989).

On June 2, 2003, PRTC filed a motion to vacate the arbitration award in the United States District Court for the district of Puerto Rico. The motion did not challenge the arbitrability of any aspect of the controversy. However, PRTC claimed that the limited FAA standard of judicial review of awards was inapplicable and that the contract provided for judicial review of all errors of law in the arbitration award. The motion alleged "various errors in

the structure of the arbitration, the procedures of the arbitration, and the ultimate findings of the arbitration." *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, Nos. 03-1593, 03-1815, slip op. at 1 (D.P.R. Mar. 9, 2004). The case was consolidated with an earlier action brought by USPhone in the Southern District of New York for confirmation of the award pursuant to the FAA.

The district court denied PRTC's motion to vacate, holding that the FAA review standards applied. The district court concluded that under the FAA standard, judicial review of arbitral awards is "only allowed in cases of corruption, serious error, misconduct, and miscalculation," and that "district courts do not have the luxury 'to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.'" *Id.*, slip op. at 2 (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).

The district court found that PRTC's challenge to the award did "not rise to anywhere near the level required under the Federal Arbitration Act in order to allow court review . . . [and] that PRTC's objections to the arbitration are essentially disagreements with the arbitrators' conclusions." *Id.*, slip op. at 3. In denying PRTC's motion, the court further observed that "[t]he mere filing of this motion controverts the purpose of the Federal Arbitration Act and is a waste of the time and resources of this Court." *Id.*, slip op. at 4. Subsequently, the court granted USPhone's motion to amend the judgment, *nunc pro tunc*, to reflect confirmation of the award. In this same order, the court denied U.S. Phone's request for attorneys' fees but granted pre-judgment and post-judgment interest on the award. *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, Nos. 03-1593, 03-1815, slip op. at 2-3 (D.P.R. Oct. 6, 2004).

PRTC appeals the denial of its motion to vacate and the judgment confirming the award. USPhone cross-appeals the denial of attorneys' fees. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review the district court decision upholding the arbitration award under "ordinary, not special, standards." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995).[3]

II. The Appropriate Standard of Judicial Review

On appeal, the parties agree that this contract is governed by the FAA. They also agree that the FAA provides for very limited review of an arbitration award. Section 10 permits courts to vacate an award only:

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[3] USPhone argues that PRTC's motion to vacate the arbitration award was untimely. Section 12 of the FAA provides: "Notice of a motion to vacate . . . an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12 (2000). The FAA requires service on nonresidents "in like manner as other process of the court" and refers to Rule 4 of the Federal Rules of Civil Procedure. Wright & Miller, 4A Fed. Prac. & Proc. Civ. 3d § 1101(2002). Here, PRTC served its motion to vacate on USPhone and its counsel by mail at least four times prior to the deadline, and was able to effect personal service on USPhone on June 5, 2003, one day after the deadline.

We need not decide whether mail service complied with Rule 4 in these circumstances, for courts have held that a failure to comply with Rule 4 (for example, by serving only the defendant's attorney) may be excused if notice actually is received. *Id.* USPhone does not deny receipt of actual notice during the three month window, nor allege any significant prejudice. The district court was within its discretion to excuse the one-day delay. *See Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 601 (8th Cir. 1981) (recognizing a "due diligence" exception to the three-month limit); *see also Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Comm., Purchase Directorate*, 360 F.2d 103, 107-08 (2nd Cir. 1966); Matter of Arbitration between Inter Carbon Bermuda, Ltd. and Cortex Trading and Tramps. Corp., 146 FORD. 64, 71 (S.D.N.Y. 1993).

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10 (2000).[4] Thus, the statute "carefully limits judicial intervention to instances where the arbitration has been tainted in certain specific ways . . . [and] contains no express ground upon which an award can be overturned because it rests on garden-variety factual or legal [errors]." *Advest, Inc.* v. *McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990). Under the FAA, an award may be vacated for legal error only when in "manifest disregard of the law." *Wonderland Greyhound Park, Inc.* v. *Autotote Sys., Inc.*, 274 F.3d 34, 35-36 (1st Cir. 2001).

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[4] Section 11, not relevant here, provides the district court with authority to "make an order modifying or correcting" an arbitration award in cases of "evident material miscalculation of figures or an evident material mistake . . . [;] [w]here the arbitrators have awarded upon a matter not submitted to them . . . [;][or] [w]here the award is imperfect in matter of form not affecting the merits of the controversy." 9 U.S.C. § 11 (2000).

However, PRTC contends that the parties contracted for more rigorous review of arbitration awards than that provided for by the FAA. In particular, PRTC asserts that the contract, by adopting Puerto Rican law and by providing that the "contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico" (language which they claim, under Puerto Rican law, requires review of the award for legal errors), demonstrates that the parties agreed to judicial review of the award for errors of law. Resolution of this question requires examination of the FAA and case law interpreting it.

A. Background and Purpose of the FAA

The FAA was enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. The Act's "purpose was to reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995) (FAA's purpose was to "overcome courts' refusals to enforce agreements to arbitrate"). The FAA broadly provides that written agreements to arbitrate "involving commerce . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2 (2000).

Under the Act, federal courts may, *inter alia*, stay litigation on issues that are within the scope of the arbitration agreement, 9 U.S.C. § 3; compel parties to submit to arbitration, 9 U.S.C. § 4; appoint neutral arbitrators, 9

U.S.C. § 5; compel appearances of witnesses at arbitration hearings, 9 U.S.C. § 7; confirm arbitration awards and enter judgment accordingly; 9 U.S.C. § 9; and, as discussed above, in very limited circumstances, vacate, modify, or correct arbitration awards, 9 U.S.C. §§ 10 & 11.

In light of the FAA's explicit purpose to override state law that impedes the enforceability of arbitration agreements, it is well established that the provisions of the FAA will prevail over contrary state-law rules. The "broad principle of enforceability" of arbitration agreements embodied in the Act is not subject "to any additional limitations under state law." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). The Supreme Court has repeatedly enforced the federal policy favoring arbitration where the controversy concerns the scope of the arbitration clause itself.

For example, in *Perry v. Thomas*, the Court held that disputes over commissions on securities sales were arbitrable under a contract that provided for arbitration, even though the California Labor Code mandated court litigation of such "wage" disputes, "despite the existence of an agreement to arbitrate." 482 U.S. 483, 486, 490-91 (1986). This was because section 2 of the FAA "embodies a clear federal policy of requiring arbitration" where there is an enforceable agreement to arbitrate. *Id.* at 489. Similarly, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court held that the parties' antitrust claims were arbitrable, notwithstanding Puerto Rican law requiring judicial resolution. 473 U.S. 614, 623 n.10 (1985).

The Court has also held that the federal policy favoring arbitration and reflected in the FAA "establishes that, as a matter of federal law, any doubts concerning the scope

of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). This is so "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* at 25; *See also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) (holding that notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts"); *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 475-76 (1989).

A difficulty has arisen, however, when another important policy in the FAA has been implicated – namely the federal policy of allowing the parties to craft their own agreements. Passage of the FAA "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985). The general rule is that arbitration agreements are to be enforced according to their terms. *Volt*, 489 U.S. at 479; *Prima Paint*, 388 U.S. at 404 n.12.

These two policies contained within the FAA – the policy favoring arbitral resolution of disputes notwithstanding state law to the contrary, and the policy favoring enforcement of arbitration agreements according to general contract principles – are potentially in conflict in two situations. First, choice-of-law provisions in arbitration contracts (providing that the contract will be governed by the law of a particular state) have been argued to evidence the parties' desire that arbitration be conducted pursuant to state law. Second, even where federal law governs, where an arbitration agreement adopts a particular

arbitration rule that departs from the FAA standard (either a state-law rule or one created for the particular agreement), there is an argument that the agreement should be enforced according to its terms, and that the specific rule chosen by the parties should prevail over the FAA standard. Here, we must first determine whether state or federal law applies to the standard of review issue and then determine if the federal standard of the FAA has been displaced.

B. Effect of the Choice-of-Law Clause

We consider first the choice-of-law argument. PRTC argues that by incorporating Puerto Rican law the parties agreed that the Puerto Rican law of judicial review of arbitration awards should apply. The Supreme Court has considered the choice-of-law issue in the *Volt* and *Mastrobuono* cases, and appears to have instructed us that the outcome should depend on whether there is a significant FAA policy that would be undermined by the state rule.

Mastrobuono involved a policy central to the FAA: the allocation of powers between the court and the arbitrators. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-60 (1995). The Court held that a choice-of-law provision could not be interpreted to substitute state for federal law. *Id.* at 58-61. The petitioners in *Mastrobuono* were unsophisticated investors who had opened a securities trading account with a large brokerage firm. *Id.* at 54. The contract, drafted in full by the brokerage firm, contained an arbitration clause providing for arbitration in accordance with the National Association of Securities Dealers ("NASD") rules. These rules allowed an award of punitive damages. *Id.* at 60-61. The contract also included

a choice-of-law clause stating that the contract was to be governed by New York law. *Id.* at 54-55. New York law prohibited arbitrators from awarding punitive damages. *Id.* at 55.

In light of the federal policy favoring arbitration, the Court concluded that the "best way to harmonize the choice-of-law provision with the arbitration provision [was] to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, *but not to include special rules limiting the authority of arbitrators*. Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration." *Id.* at 63-64 (emphasis added). In other words, a choice-of-law clause, standing alone, generally will not be interpreted to require the application of state law restricting "the authority of arbitrators."

Volt, on the other hand, held that a choice-of-law provision could properly be interpreted by the state court to provide for application of California law as to the relative timing of judicial and arbitration proceedings. 489 U.S. at 479. There, the contract provided that "[t]he contract shall be governed by the law of the place where the Project is located," that is, California. *Id.* at 470 (modification in original). California law provided that an arbitration should be stayed pending related litigation by one of the parties to the arbitration agreement with parties not bound by the arbitration agreement. There was no provision of the FAA either requiring a stay of arbitration in such circumstances or prohibiting a stay.[5]

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[5] Section 3 of the FAA states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an

(Continued on following page)

The Supreme Court, deferring to the state court's interpretation of the contract, found that the federal policy favoring arbitration was not offended by application of California's laws because, "[t]here is no federal policy favoring arbitration under a certain set of procedural rules." *Volt*, 489 U.S. at 476. More recently, the Court has clarified that the proper inquiry is whether the state law requirement "undermine[s] the goals and policies of the FAA," *Doctor's Assocs. v. Cassaroto* [sic], 517 U.S. 681, 685 (1996) (internal quotation marks omitted), and explained that "[t]he state rule examined in *Volt* determined *only* the efficient order of proceedings." *Id.* at 688 (emphasis added). Thus, *Volt* establishes that application of state law rules is appropriate only when there is no conflicting federal policy.

We conclude that this case is closer to *Mastrobuono* than to *Volt*, because here, the policies of the FAA are implicated. Here, PRTC argues that the choice-of-law provision requires us to apply Puerto Rican law to

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agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. 9 U.S.C. § 3 (2000). This provision has been interpreted to require a stay of litigation between the parties to the arbitration agreement when the subject of the litigation is within the scope of the agreement. *See e.g., Moses H. Cone*, 460 U.S. at 22, 22 n.27. Section 3 does not directly address the issue of stays of litigation involving non-parties. Other courts have broadly interpreted section 3 – in combination with the district court's inherent power to manage its own docket – to authorize the district court to issue a stay of litigation involving non-parties. *See, e.g., City of Bismarck v. Toltz, King, Duvall*, 767 F.2d 429, 432-33 (8th Cir. 1985).

determine whether the contract requires more searching judicial review of the arbitration award than that provided for in the FAA. The extremely limited judicial review contemplated by the FAA clearly implicates the federal policy favoring final resolution of disputes by arbitration and, in particular, affects the allocation of powers between the court and the arbitrators. *Mastrobuono*, 514 U.S. at 59-60. Allowing more searching judicial review would inherently limit the authority of arbitrators. *Jacada Ltd. v. Intern. Mktg. Strategies*, 401 F.3d 701, 711 (6th Cir. 2005); *see also Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001) ("[E]xpanded judicial review would threaten the independence of arbitration . . . and reduces arbitrors' willingness to create particularized solutions for fear the decision will be vacated by a reviewing court.").

In light of this policy, the mere inclusion of a generic choice-of-law clause within the arbitration agreement is not sufficient to require the application of state law concerning the scope of review, since there is a strong federal policy requiring limited review. This is particularly so when the state law at issue is "specifically and solely applicable to arbitration agreements." *Painewebber Inc. v. Elahi*, 87 F.3d 589, 593 (1st Cir. 1996). Just as the generic choice-of-law clause in *Mastrobuono* was insufficient to invoke New York law precluding arbitrators' awards of punitive damages, a "generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default regime" for vacatur of arbitral awards. *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 289, 297 (3rd Cir. 2001).

Our conclusion in this respect is in keeping with the decisions of every circuit that has considered the question. These other circuits have held that the mere inclusion of a

choice-of-law clause within the arbitration agreement is insufficient to indicate the parties' intent to contract for the application of state law concerning judicial review of awards.[6]

Thus, here the choice-of-law provision in Clause 4 of the contract is insufficient to render applicable Puerto Rican law concerning the scope of judicial review.

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[6] *See, e.g., Jacada*, 401 F.3d at 711-12 (holding that generic choice-of-law provision did "not unequivocally suggest an intent to displace the default federal standard"); *Roadway*, 257 F.3d at 289; *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998) (finding choice-of-law provision insufficient to invoke state law providing for more searching judicial review; "we will not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear").

Our holding is also consistent with the decisions of this circuit and others that have found a generic choice-of-law provision insufficient to incorporate state law on the allocation of powers between the court and the arbitrator. *See, e.g., Elahi*, 87 F.3d at 593 (following Mastrobuono to "find that the choice-of-law clause in this case is not an expression of intent to adopt New York case law requiring the courts to apply section 15 [the NASD time bar on arbitration]"); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 327 (2d Cir. 2004) ("[T]his Court has rejected the argument that a general choice-of-law provision without more evidences the parties intent to incorporate New York decisional law on the allocation of powers between the court and the arbitrator.")(internal quotation marks and citations omitted); *Ferro Corp. v. Garrison Indus., Inc.*, 142 F.3d 926, 937 (6th Cir. 1998) (holding choice-of-law clause was "not an unequivocal inclusion" of the Ohio arbitration rule that courts, not arbitrators decide the issue of fraudulent inducement of the agreement to arbitrate) (internal quotation marks omitted); *Porter Hayden Co. v. Century Indem. Co.*, 136 F.3d 380, 382-84 (4th Cir. 1998) (finding general choice-of-law provision insufficient to require application of Maryland arbitration law and that timeliness defenses should therefore be submitted to arbitration).

C. Effect of Other Provisions

PRTC argues, however, that, even applying federal law, the contract should be read as evidencing an explicit decision to provide for more searching judicial review. Specifically, it urges that the language of Clause 4 of the contract is not merely a choice-of-law clause because it provides that "[t]his Contract shall be governed by and interpreted *in accordance with the laws of the Commonwealth of Puerto Rico.*" Under Puerto Rican law, if the parties' arbitration agreement specifies that the award should be "conformable to law" ("conforme al derecho"), then the award will be reviewed for legal error. *See, e.g., Unión de la Industria Licorera de Ponce v. Destilería Serrallés, Inc.*, 116 P.R. Offic. Trans. 426, 432 (P.R. 1985); *S.I. U. De Puerto Rico v. Otis Elevator Co.*, 105 P.R. Offic. Trans. 1156, 1163 (P.R. 1977); *see also Febus v. MARPE*, 135 D.P.R. 206 (1994). PRTC argues that the "in accordance with the laws" language demonstrates an intent to subject the arbitrators' award to review for errors of law. US Phone, on the other hand, urges the language here is insufficient under Puerto Rican law to invoke review for legal error, and that the contract itself explicitly provides that the findings of the arbitrator "shall be final and binding for both parties," thus precluding more searching review.

We need not decide whether as a matter of local law this contract would be construed as providing for review of legal error, for we conclude that the FAA creates a presumption that the more limited FAA standard will govern, and the language here, as a matter of federal law, is insufficient to overcome the presumption.

The issue whether the parties by contract can supplant the FAA standard of review has generated substantial litigation. Some circuits that have held that parties can never by contract agree to a different standard of review, holding that "because Congress has specified the exclusive standard by which federal courts may review an arbitrator's decision . . . private parties may not contractually impose their own standard on the courts." *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 994 (9th Cir. 2003) (*en banc*); *Bowen*, 254 F.3d at 935.[7]

These cases construe the FAA to preclude such a contractual provision on the theory that allowing private parties to contract for more searching review standards would create federal jurisdiction by contract. *Kyocera*, 341 F.3d at 999 (citing *Chi. Typographical Union*, 935 F.2d at 1504-05). This concern seems to us misplaced, as it is well settled that federal courts have jurisdiction over suits seeking to compel arbitration (or to vacate or enforce arbitration awards) only if the parties are of diverse citizenship, or some separate grant of jurisdiction applies.[8]

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[7] The Eighth Circuit has also suggested that it would not allow parties to contract for expanded judicial review, although it did not finally decide the issue, finding the contract language at issue insufficient to indicate the parties' intent to do so. *See UHC Mgmt. Co.*, 148 F.3d at 996-97. The Seventh Circuit, in a decision construing section 301 of the Taft-Hartley Act but "looking to" the FAA for guidance has also suggested that parties cannot contract for vacatur standards other than those set forth in the FAA. *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991).

[8] The FAA is "something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under [28 U.S.C. § 1331 (2000)] or otherwise." *Moses H. Cone*, 460 U.S. at 25 n.32.

Modifying the review standard does not expand federal jurisdiction.

These decisions also rest on a policy concern that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Kyocera*, 341 F.3d at 998; *accord Bowen*, 254 F.3d at 935. These cases invoke the goal of preserving the "independence of the arbitration process," *Bowen*, 254 F.3d at 935, or, put otherwise, the independence of the arbitrators.

However, the Supreme Court has emphasized on more than one occasion that the principal objective behind the passage of the FAA was enforcement of the parties' agreements, and that efficient dispute resolution should not be favored over the FAA's primary goal of enforcing private agreements to arbitrate, given Congress's "preeminent concern in passing the Act . . . to enforce private agreements." *Dean Witter Reynolds*, 470 U.S. at 221; *see also Moses H. Cone*, 460 U.S. at 20 (FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis omitted).

Other circuits have held that the parties may contract to displace the FAA standards. *See, e.g., Jacada*, 401 F.3d a *Roadway*, 257 F.3d at 288-89; *Gateway Techs., Inc. v. MCI*, 64 F.3d 993, 996-97 (5th Cir. 1995). These courts have held that the Act's ultimate purpose is to enforce the terms of the agreement to arbitrate, and that they are therefore bound by federal law to enforce the arbitration agreements as drafted. *See, e.g., Roadway*, 257 F.3d at 292. At the same time they have recognized that the federal policy in favor of recognizing broad authority of the

arbitrators, even if not sufficient to override the parties' agreement for more searching review, at least requires a presumption that the FAA standard will apply. *Id.* at 294. Thus, in the few cases where courts have found that the parties contracted for more searching judicial review of arbitral awards, there has been explicit contractual language that specified the precise nature of the intended judicial review. *See, e.g., Gateway Techs.*, 64 F.3d at 996 (contract language stated that "[t]he arbitration decision shall be final and binding on both parties, except that *errors of law shall be subject to appeal*")(emphasis and modification in original); *Harris v. Parker Coll. of Chiropractic*, 286 F.3d 790, 793-94 (5th Cir. 2002) (contract expressly provided that "each party shall retain his right to appeal any questions of law").

We agree with the other circuits that have concluded that the parties can by contract displace the FAA standard of review, but that displacement can be achieved only by clear contractual language. The contract here, even if sufficient under Puerto Rican law, is far short of the explicit language required by federal law to displace the FAA standard of review, particularly in light of the agreement's language that any disputes "shall be finally settled" under the AAA Rules. *See Elahi*, 87 F.3d at 594. We conclude that the FAA standard applies.

III. Interpreting the Governing Standard

PRTC contends that, even applying the federal standard, the award should be set aside. As we noted earlier, under the FAA itself, "judicial review of arbitration awards is available where arbitrators have acted in manifest disregard of the law." *Prudential-Bache Secs., Inc. v.*

Tanner, 72 F.3d 234, 239 (1st Cir. 1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)). Thus, "a mere mistake of law by an arbitrator cannot serve as the basis for judicial review." *Id.* at 239 n.6. Rather, "manifest disregard" means that "arbitrators knew the law and explicitly disregarded it." *Advest*, 914 F.2d at 10. Vacatur is appropriate under the manifest disregard standard only when the award is "'unfounded in reason and fact, . . . based on reasoning so palpably faulty that no judge or group of judges could ever conceivably have made such a ruling, or is mistakenly based on a crucial assumption which is decidedly a non-fact.'" *Challenger Caribbean Corp. v. Unión General de Trabajadores*, 903 F.2d 857, 861 (1st Cir. 1990) (quoting *In re Hotel Da Vinci*, 797 F.2d 33, 34 (1st Cir. 1986)). Put differently, "disregard implies that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it. As arbitrators need not explain their award, and did not do so here, it is no wonder that appellant is hard pressed to satisfy the exacting criteria for invocation of the doctrine." *Advest*, 914 F.2d at 10 (internal quotation marks and citations omitted).[9]

This standard has not remotely been satisfied here. PRTC contends that the arbitrators failed to recognize various breaches of cardinal contractual obligations by US Phone that provided a defense to US Phone's claims for breach of contract. Thus, for example, US Phone allegedly

[9] "'[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision," under the manifest disregard standard. *Advest*, 914 F.2d at 9 (quoting *Misco*, 484 U.S. at 371).

violated the contract by failing to comply with applicable FCC requirements. PRTC's argument that the district court failed to review the arbitration award under the "manifest disregard of the law standard" is nothing more than a thinly veiled attempt to obtain appellate review of the arbitrators' legal and factual determinations regarding the contract dispute. The district court properly rejected PRTC's claim, finding that "PRTC's objections to the arbitration are essentially disagreements with the arbitrators' conclusions." *P.R. Tel.*, Nos. 03-1593, 03-1815, slip op. at 3.

IV. Attorneys' Fees

In its cross-appeal, USPhone contends that the district court erred in refusing to award attorneys' fees, in light of various observations made by the district court when dismissing with PRTC's motion with prejudice.[10]

Our review of the district court's denial of attorney fees is for abuse of discretion. *Top Entm't, Inc. v. Torrejon*, 351 F.3d 531, 533 (1st Cir. 2003).

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[10] Specifically, US Phone cites to the following language from the district court's Opinion and Order:

> The Court finds that the basis for review stated by PRTC in this case does not rise to anywhere near the level required under the Federal Arbitration Act in order to allow court review. The Court finds that PRTC's objections to the arbitration are essentially disagreements with the arbitrators' conclusions. This type of disagreement cannot form the basis of a legitimate motion to vacate an arbitration award because it would subvert the very purpose of arbitration. . . . The mere filing of this motion controverts the purpose of the Federal Arbitration Act and is a waste of the time and resources of this Court."

P.R. Tel., Nos. 03-1593, 03-1815, slip op. at 3-4.

Puerto Rican law, which governs the question of fees in this diversity action, see *Newell P.R., Ltd. v. Rubbermaid Inc.*, 20 F.3d 15, 24 (1st Cir. 1994), provides that "[i]n the event any party or its lawyer has acted obstinately or frivolously, the court shall, in its judgment, impose on such person the payment of a sum for attorney's fees which the court decides corresponds to such conduct." P.R. R. Civ. P. 44.1(d). Puerto Rican law thus provides that an award of fees shall be made for either (1) obstinate conduct or (2) frivolous litigation. There is no basis for US Phone's contention that federal law requires a more liberal standard for the award of attorney's fees in suits seeking to set aside arbitration awards. [11]

Under Rule 44.1(d), "a finding of obstinacy requires that the court determine a litigant to have been unreasonably adamant or stubbornly litigious, beyond the acceptable demands of the litigation, thereby wasting time and causing the court and the other litigants unnecessary expense and delay." *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 126 (1st Cir. 1991). Factual findings of specific instances of misconduct, taking into account the overall character of the litigation, are required to support a finding of obstinacy mandating the award of attorney fees under Puerto Rican law. *See, e.g., Mejias-Quiros v. Maxxam Prop. Corp.*, 108 F.3d 425, 429 (1st Cir. 1997); *Dopp v. Pritzker*, 38 F.3d 1239, 1253-54 (1st Cir. 1994). "Examples of obstinate conduct include: denying all liability in answering a complaint, where the defendant

[11] The case relied upon by US Phone, *Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 282 (1st Cir. 1983), involved an arbitration award enforceable under section 301(b) of the Labor Management Relations Act, codified at 29 U.S.C.§ 185(b).

later admits liability; raising inapplicable defenses; denying all liability when only the amount of damages sought is contested; and denying a fact, knowing it is true." *Correa v. Cruisers, a Div. Of KCS Int'l, Inc.*, 298 F.3d, 13, 31 (1st Cir. 2002) (citation omitted). The district court here made no such explicit factual finding, nor does the record otherwise document specific instances of obstinate conduct. *Compare Top Entm't*, 351 F.3d at 534.

The district court also did not conclude that the motion to vacate was frivolous, although the court did observe that PRTC's filing of its motion was "a waste of time and resources of this court." Moreover, a finding of frivolity would not be justified in this case. The district court acted within its discretion in denying US Phone's motion for the award of fees.

V.

In sum, we hold that the parties did not by contract displace the FAA standard of review and, under the FAA standard, the district court properly denied the motion to vacate and confirmed the arbitration award. The district court also did not err in denying U.S. Phone's motion for attorney fees. Accordingly, we *affirm* the district court's judgment.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PUERTO RICO TELEPHONE COMPANY, Plaintiff, vs. U.S. PHONE MANUFACTURING CORP., Defendant	*	CIVIL NO. 03-1593 (JP)
U.S. PHONE MANUFACTURING CORP., Plaintiff, vs. PUERTO RICO TELEPHONE COMPANY, Defendant	*	CIVIL NO. 03-1815 (JP)

OPINION AND ORDER

As part of the continuing saga in this case, before the Court is Defendant U. S. Phone Manufacturing Corp.'s "Motion to Alter or Amend Judgment and for Correction of Clerical Mistake" (**docket No. 27**); and Plaintiff Puerto Rico Telephone Company's ("PRTC") opposition thereto (docket No. 28). On March 9, 2004, this Court issued an Opinion and Order where it dismissed Plaintiff's claims in these two consolidated cases, finding that PRTC had not shown sufficiently good cause to vacate an arbitration award in favor of U. S. Phone Manufacturing Corp. ("U. S. Phone"). Specifically, the Court held that the judicial

review was only allowed in cases of corruption, serious error, misconduct, and miscalculation, and that these factors were not present in this case, and that therefore, vacating the award was not warranted. It further held that it found PRTC's claims were basically "disagreements with the arbitrators' conclusions" which could not be the basis of a proper motion to vacate. *Opinion and Order* at 3. The Court then issued Judgment accordingly, dismissing with prejudice both cases before the Court, Civil Nos. 03-1593 and 03-1815.

U.S. Phone now petitions the Court to amend that Judgment, alleging that the Court committed a clerical mistake when it dismissed both cases with prejudice. For the clarity of the record, the first case, Civil No. 03-1815, the first case filed, was a petition for confirmation of the arbitral award, which was filed by U.S. Phone in the Southern District of New York on April 24, 2003, which was later transferred to this Court. In said case, in light of PRTC's lack of payment, U.S. Phone sought relief pursuant to the Federal Arbitration Act and sought judicial enforcement of the award issued in its favor on March 5, 2003 by the American Arbitration Association in the amount of $2,552,123.99. The second case, Civil No. 03-1593 was filed June 2, 2003 in Puerto Rico by PRTC to vacate the arbitral award entered against it.

U.S. Phone alleges that when the Court dismissed with prejudice both cases in its Judgment of March 9, 2004, it dismissed both cases but inadvertently did not enter judgment enforcing the arbitration award as sought in Civil No. 03-1815. The Court agrees with Defendant U.S. Phone that the Judgment entered was incomplete, and hereby **GRANTS** its motion to amend the Judgment,

nunc pro tunc, to reflect that it hereby **CONFIRMS** the award entered by the American Arbitration Association.

U. S. Phone also requests that attorneys' fees, post-award prejudgment interest, and post-judgment interest be granted. Regarding the attorneys' fees, the request is hereby **DENIED.**

Regarding the post-award, pre-judgment interest issue, the Court finds that U. S. Phone is entitled to pre-judgment interest from the time the award was made. See Eureka Homestead Soc. v. Zirinsky, 1997 WL 149977, *1 (E.D. La. 1997) (awarding post-award, prejudgment interest from the date of the arbitration award to the date the award was paid) and Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co., 866 F.2d 11, 14 (1st Cir. 1989) ("with respect to entitlement, we agree with the district court that, under either federal or state law, interest should be awarded from the date of the arbitration decision"). Therefore, the Court **GRANTS** U. S. Phone's petition for post-award, pre-judgment interest from the date of the arbitration award, March 4, 2003, until the date of the original Judgment of this Court, March 9, 2004.

The Court next turns to the rate of the aforementioned post-award, pre-judgment interest. As is well known, the rate of pre-judgment interest is a matter that is committed to the Court's discretion. See Chandler v. Bombardier Capital, Inc., 44 F.3d 80, 84 (2d Cir. 1994); Frank v. Relin, 851 F. Supp. 87, 91 (W. D. N. Y. 1994) ("In general, district courts have discretion in deciding what interest rate to use in awarding pre-judgment interest"); and Rao v. New York City Health and Hospitals Corp., 882 F. Supp. 321, 327 (S.D. N.Y. 1995). The Court believes the

Puerto Rico state law 6% interest rate is the proper rate for post-award, pre-judgment interest, which the Court holds **SHALL** apply from March 4, 2003, the date of the award, until March 9, 2004, the date Judgment was entered by this Court. See 31 P. R. Laws Ann. § 3025.

Regarding the post-judgment interest rate, 28 U.S.C. § 1961(a) provides that the federal post-judgment interest rate shall be equal to the one year Treasury bill rate at the time of judgment. See 28 U.S.C. § 1961(a); see also Rao, 882 F. Supp. at 327 (applying 28 U.S.C. § 1961(a) to post-judgment award). Therefore, this rate **SHALL** govern the interest on the award in favor of U. S. Phone from March 29, 2004 until paid.

In light of the aforementioned analysis, Judgment shall be entered accordingly, *nunc pro tunc* to March 9, 2004, confirming the award of the American Arbitration Association.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 6th day of October, 2004.

/s/ Jaime Pieras, Jr.
JAIME PIERAS, JR.
U. S. SENIOR DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PUERTO RICO TELEPHONE COMPANY, Plaintiff, vs. U.S. PHONE MANUFACTURING CORP., Defendant	*	CIVIL NO. 03-1593 (JP)
U.S. PHONE MANUFACTURING CORP., Plaintiff, vs. PUERTO RICO TELEPHONE COMPANY, Defendant	*	CIVIL NO. 03-1815 (JP)

OPINION AND ORDER

The Court has before it Plaintiff Puerto Rico Telephone Company's ("PRTC") Motion to Vacate Arbitration Award (**docket No. 1**). In this motion, PRTC claims various errors in the structure of the arbitration, the procedures of the arbitration, and the ultimate findings of the arbitration that require this Court to review the arbitration and vacate the arbitration award. PRTC insists that this Court has the power to review the arbitration proceedings. However, the Court finds that it lacks jurisdiction to review this arbitration given the circumstances. According to Sections 10 and 11 of the Federal Arbitration Act,

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration;

(1) Where the award was procured by corruption, fraud, or undue means;

(2) Where there was evident partiality or corruption in the arbitrators, or in either of them;

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 11

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration;

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a

> matter not affecting the merits of the decision upon the matter submitted;
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

According to the statute, judicial review is only allowed in cases of corruption, serious error, misconduct, and miscalculation. Judicial review of an arbitration award under the FAA is thus "extremely narrow and exceedingly deferential." Bull HN Info. Sys., Inc., v. Hutson, 229 F.3d 321, 330 (1st Cir. 2000). Indeed, district courts do not have the luxury "to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38, 108 S. Ct. 364, 371 (1987), Wheelabrator Envirotech Operating Services, Inc. v. Massachusetts Laborers Dist. Council Local 1144, 88 F.3d 40, 43 (1st Cir. 1996) (a "district court's review of arbitral awards must thus be 'extremely narrow and exceedingly deferential'"). For that reason, "arbitral awards are nearly impervious to judicial oversight." Teamsters Local Union No. 42 v. Supervalu, Inc., 212 F.3d 59, 61 (1st Cir. 2000). This is so because the parties "have contracted to have disputes settled by an arbitrator" and thus, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." Bull HN, 229 F.3d at 330. If a party were allowed to turn to the courts every time it disagreed with the ruling of an arbitrator, this would destroy the very purpose of arbitration. As aptly stated by the First Circuit Court of Appeals, "[A] mere mistake of law by an arbitrator cannot serve as the basis for judicial review. We have long recognized the general rule that 'courts are not allowed to review the merits of an arbitral award.'" Challenger Caribbean Corp.

v. Unión General de Trabajadores, 903 F.2d 857, 861 (1st Cir. 1990).

The Court finds that basis for review stated by PRTC in this case does not rise to anywhere near the level required under the Federal Arbitration Act in order to allow court review. The Court finds that PRTC's objections to the arbitration are essentially disagreements with the arbitrators' conclusions. This type of disagreement cannot form the basis of a legitimate motion to vacate an arbitration award because it would subvert the very purpose of arbitration. By agreeing to arbitrate disputes with Defendant, Plaintiff agreed to accept the results of arbitration, except where these results were tainted by fraud, misconduct, or serious error, which is not the case here. The mere filing of this motion controverts the purpose of the Federal Arbitration Act and is a waste of the time and resources of this Court.

Therefore, the Court **DENIES** Plaintiff Puerto Rico Telephone's Motion to Vacate Arbitration Award **(docket No. 1)**, **ENTERS JUDGMENT** for Defendant U.S. Phone Manufacturing Corp. and **DISMISSES WITH PREJUDICE** the consolidated cases Civ. No. 03-1593 and Civ. No. 03-1815.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 9th day of March, 2004.

/s/ Jaime Pieras, Jr.
JAIME PIERAS, JR.
U. S. SENIOR DISTRICT JUDGE

AMERICAN ARBITRATION ASSOCIATION
International Arbitration Tribunal

IN THE MATTER OF ARBITRATION BETWEEN

RE: 50 T 181 00001 93

U.S. PHONE MANUFACTURING CORP.
vs.
PUERTO RICO TELEPHONE COMPANY

AWARD OF ARBITRATORS

A. WE, THE UNDERSIGNED ARBITRATORS, have been designated in accordance with the arbitration agreement entered into between the above-named parties and dated December 2, 1988, and have been duly sworn.

B. The UNDERSIGNED duly heard and considered the proofs and allegations of the Parties, including approximately 10 days of testimony encompassed within approximately 1900 pages of transcripts, and approximately 175 exhibits, including physical evidence, as well as documents comprising approximately 1700 pages.

C. Based on the foregoing record, the UNDERSIGNED do hereby AWARD, as follows:

1. Within thirty (30) days from the date of transmittal of this Award to the Parties, PUERTO RICO TELEPHONE COMPANY (hereinafter referred to as "Respondent") shall pay to U.S. PHONE MANUFACTURING CORP. (hereinafter referred to as "Claimant"), the sum of Two Million Five Hundred Fifty Two Thousand One Hundred Twenty Three Dollars and Ninety Nine Cents (US$ 2,552,123.99).

2. The compensation and expenses of the neutral arbitrator totaling ninety seven thousand one hundred fifty one dollars and forty-seven cents (US$ 97,151.47) shall be borne equally by the parties. Therefore, Claimant shall pay to the American Arbitration Association the sum of one hundred thirty five dollars and fifty-six cents (US$ 135.56)for compensation still due to Arbitrator, and Claimant shall pay to respondent the sum of two thousand one hundred thirty two and twenty one cents (US$ 2,132.21) for that portion of its share of administrative fees and expenses previously advanced by Respondent to the Association.

3. The administrative fees and expenses of the American Arbitration Association totaling ten thousand four hundred eighty two dollars and nine cents (US$ 10,482.09)shall be borne equally by the parties. Therefore, Respondent shall pay to Claimant the sum of nine hundred dollars (US$ 900.00) for that portion of its share of administrative fees and expenses previously advanced by Claimant to the Association.

4. This award is in full settlement of all claims and counterclaims submitted to this Arbitration.

5. The Panel takes note of the Claimant's obvious and serious concern regarding the substantial and adverse impact which would occur if an attempt were to be made to assert and withhold alleged Puerto Rico taxes from the Award. However, the Panel lacks the authority to determine whether or not any tax might be due from Claimant under

Puerto Rican law. Therefore, the entire Award shall be paid within the time provided, unless a portion is required to be withheld by applicable law or by order of Court.

We hereby certify that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in March 4th., 2003.

State of
County of

I, Ronald Sharpo, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument: which is my Award

_____ /s/ _____
Date Ronald Sharpo

State of
County of

I, Enrique Umpierre-Suarez, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument: which is my Award

_____ /s/ _____
Date Enrique Umpierre-Suarez

State of
County of

I, Luiz Ernesto R. Gozzoll, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument: which is my Award

_____ /s/ _____
Date Luiz Ernesto R. Gozzoll

(3)

FILED
MAR 16 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1021

In The Supreme Court of the United States

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

v.

U.S. PHONE MANUFACTURING CORPORATION,

Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the First Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent U.S. Phone Manufacturing Corporation does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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Respondent U.S. Phone Manufacturing Corporation ("USPhone") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari (the "*Petition*") filed by Puerto Rico Telephone Company ("PRTC").

INTRODUCTION

The First Circuit ruled in this case that in order for a party to opt out of the substantive provisions of the Federal Arbitration Act ("FAA"), it must do so by clear and explicit contractual language, and not by inserting ambiguous or generic state choice-of-law provisions into its contract.[1] This is a settled issue long decided by this Court, and one on which there is unanimity among the circuits.[2] This Court denied *certiorari* to review this very issue less than four months ago. *Jacada Ltd. v. Intern. Mktg. Strategies*, 401 F.3d 701 (6th Cir. 2005), *cert. denied*, 126 S.Ct. 735, 163 L. Ed. 2d 570 (November 28, 2005). Given that there is no basis upon which to request *certiorari* on this settled matter, PRTC attempts to piggyback on a *dictum* of the appellate court on the separate issue of whether the FAA precludes expansion of its review provisions. *Dicta* such as these are by definition an improper subject for review by *certiorari*.

Moreover, the *Petition* misstates the premise of local law upon which it predicates its request for review. Puerto Rico law does not expand judicial review of an arbitral award when a contract contains a choice-of-law clause providing that it shall be governed and interpreted in accordance with Puerto Rico law. Puerto Rico law actually bars expanded

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1 Opinion of the Court of Appeals ("*Opinion*"), *Petition* App. 2.

2 Id., App. 14-15.

judicial review of an award, unless the contract 'expressly' provides that the decision of the arbitrators must conform to law. Such an explicit provision was conspicuously absent from the contract drafted by PRTC in this case. The *Petition* is therefore entirely predicated on an incorrect and contested interpretation of Puerto Rico law – an issue the court of appeals did not reach, because it was immaterial to its rejection of PRTC's challenge to the award. The absence of a settled predicate of state law upon which to review a federal question by itself renders *certiorari* review impracticable.

STATEMENT OF THE CASE

In the 1980's, PRTC had a virtual monopoly over telephone facilities and equipment in Puerto Rico. As a government-owned entity at the time, it was required by law to hold public bids for the award of any major contracts. In 1988 it held a bid for the award of a five-year contract for its requirements of residential telephone sets with memory. USPhone and two other companies won the bid, and PRTC agreed to apportion its requirements during the contract period among the three successful bidders on the basis of actual consumer demand.

USPhone's contract was entirely drafted by PRTC. It was attached to the bidding instructions and therefore was not the subject of negotiation. It had two clauses that referred to its governing law. The first one was a standard choice-of-law clause titled "Language and Law" that stated in pertinent part that the contract "shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico."[3] The second provision was part of a clause titled "Arbitration Panel" and merely stated

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[3] See contract Clause 4(b), *Petition* at 6. This boilerplate choice-of-law language does not have a special meaning in Puerto Rico, as Petitioner contends. See *infra* at 7-12.

that "[t]he Panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico."[4] There was no contractual language providing that the controversy had to be decided in accordance with legal principles, or that the award had to conform to law or be issued 'according to law,' or that it would be the subject of review for mistakes of law. Instead, the arbitration clause expressly provided that contractual disputes "shall be finally settled" under the American Arbitration Association ("AAA") Rules, and that the findings of the arbitrators "shall be final and binding for both parties."[5] The AAA Rules incorporated by the contract provided that the parties shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.

After buying increasing quantities of USPhone's product during the first two contract years as required by consumer demand, PRTC suddenly suspended its purchases and then terminated the contract. USPhone responded by filing a claim in arbitration. The contract provided for a three-arbitrator panel. Each party selected its arbitrator, and the AAA selected the neutral presiding member. Evidence at the arbitration hearings established that during the last three contract years, PRTC had furtively withdrawn USPhone's product from its commercial displays after prohibiting its advertisement, and had ordered its personnel to stop showing, marketing and delivering the product. In its stead, PRTC had introduced to its captive customers as their sole option a lower-quality, higher-priced set manufactured by a local company that had close ties to PRTC and its management, but that had not qualified to participate in the bid. When USPhone complained about the suspension of purchase orders, PRTC responded that it still had sufficient inventory of the product. In truth, PRTC had surreptitiously excluded USPhone from the market, while purchasing

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4 *Petition* at 5.

5 See contract Clauses 17.2 and 17.3 transcribed in the *Petition* at 5-6.

hundreds of thousands of defective residential memory telephone sets from a company that had not participated in the bid.

On March 4, 2003, more than ten years after commencement of the arbitration, the panel issued a unanimous award in the amount of $2,552,123.99 in USPhone's favor. *Petition* App. 32-34. As is common in arbitration awards, the decision contained no discussion of the arbitrators' reasoning.[6]

REASONS FOR DENYING THE PETITION

A. PRTC Seeks Review of a *Dictum* That Is Unsuitable for Review by Certiorari

The question presented by PRTC for review is "whether the FAA pre-empts the rights of parties seeking to invoke state-law arbitration principles to opt out of the FAA's more restrictive judicial review regime [...]."[7] PRTC would have this Court address that question by resolving three abstract issues without any specific factual context: (i) whether the FAA review provisions can be contractually displaced in favor of a more expansive standard, (ii) if so, whether parties can do away with FAA sections 10 and 11 by contractually invoking state law, and (iii) if so, what legal standards and criteria should be invoked in that regard. *Petition* at 10-11.

These are all theoretical issues, none of which arises from the established facts of this case, or was part of the *ratio decidendi* of the opinion below.

The decision of First Circuit was as follows:

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6 Id., See also *Opinion*, *Petition* at App. 4.

7 *Petition* at page i.

> "We hold that the judicial review provisions of the FAA can be displaced only by explicit contractual language evincing the parties' clear intent to subject the arbitration award to a different standard of review. Here, no such clear statement was contained in the contract."

Opinion, Petition at App. 2.

The court thus held that as a matter of federal law, PRTC's insertion of generic choice-of-law language into its contract was insufficient to evince a clear intent to opt out of the FAA. *Opinion, Petition* App. 14-15. It based its decision in this regard on *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), and on the explanation of the scope of *Volt Information Servs., Inc. v. Bd. of Trustees*, 489 U.S. 468 (1989) contained in *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 685 (1996). App. 11-14. The court specifically noted that "[o]ur conclusion in this respect is in keeping with the decisions of every circuit that has considered the question." App. 14. This ruling disposed of the entire case, because PRTC had not challenged the award on grounds recognized by the FAA.[8]

PRTC now attempts to sidestep the relevant issue by enshrouding it within the thicket of a *dictum* contained in the *Opinion*, on the separate matter of whether the FAA pre-empts contractual displacement of its review standards. *Petition* at 13-17. That issue has generated some federal litigation, but is immaterial to the resolution of this case. Regarding that issue, the First Circuit was of the view that, had the parties unambiguously agreed to expand judicial review of the award, the FAA would not have pre-empted such an agreement. *Opinion* at App. 17-19. However, whether or not the FAA pre-empts expanded award review,

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[8] PRTC essentially raised factual disagreements with the conclusions of the arbitrators. See opinion of the district court, *Petition* App. 31.

the fact remains that mere inclusion of generic state choice-of-law language in a contract is insufficient to evince an intent to opt out of the provisions of that federal statute. *Mastrobuono*, 514 U.S. at 63-64. This is even more so when the ambiguous language was drafted by the party trying to avoid enforcement of the award. Id., 514 U.S. at 62-63.

Statements such as those made by the First Circuit on the ancillary issue of pre-emption are pure *dicta*, and thus not a proper subject of review by this Court. See *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 516 n. 11 (1998) (there is no need to address pure *dictum* on *certiorari*); *cf also Bunting v. Mellen*, 514 U.S. 1019, 1023 (2004) (Scalia, J., dissenting) ("We sit, after all, not to correct errors in *dicta*.") Moreover, the appellate court's comments actually supported the position advanced by PRTC, placing PRTC in the untenable position of not only seeking certiorari to review a *dictum*, but a *dictum* that was favorable to it. Such a request dramatizes the insubstantial nature of the *Petition*. *Cf. California v. Rooney, 483 U.S. 307, 311 (1987)* (*per curiam*) ("this Court reviews judgments, not statements in opinions."); *Cf.* also R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 79 (8th ed. 2002) (Supreme Court reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed).

Indeed, this Court denied *certiorari* this very term less than four months ago, on the same issue. In *Jacada*, *supra*, the Sixth Circuit held, also on the basis of *Mastrobuono* and *Casarotto*, that a choice-of-law provision was insufficient evidence that the parties intended to displace the FAA standard for award vacatur. 401 F3d at 712.[9] In requesting *certiorari*, the *Jacada* petitioner also attempted to couch the issue in terms of pre-emption, and also cited to cases dealing with whether the FAA allowed contractual expansion of its

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[9] The First Circuit cited *Jacada* approvingly. Petition App. 15 n. 6.

judicial review standards. Although *Jacada* included international commerce issues and involved facts far more cogent than those of the instant case, this Court denied *certiorari*. 126 S.Ct. 735, 163 L.Ed. 2d 570 (Nov. 28, 2005). The *Petition* in this case is far less substantial than that of *Jacada*, and *certiorari* should thus be denied herein for far more compelling reasons.

B. The Petition is Entirely Grounded on an Incorrect and Contested Representation of Puerto Rico Law

Apart from the above, PRTC does not apprise this Court of another issue that fatally undermines its request for *certiorari*. The *Petition* is premised on the representation that the language of Clause 4(b) of the contract providing that the contract shall be governed by and interpreted "in accordance with the laws" of Puerto Rico has specialized meaning under Puerto Rico law, requiring *de novo* review of all legal issues underlying the arbitral award. *Petition* at 6, 7, 10-11, 17-21. This is a misstatement of Puerto Rico law. Such a provision is generic choice-of-law language in Puerto Rico, as it is elsewhere.[10]

There is divergent language not found in PRTC's contract that traditionally has been regarded by Puerto Rico courts as allowing for expanded judicial review of an arbitral award. Such language does not concern the choice of the law that will govern the contract or that is to be applied by the arbitrators in their resolution of disputes. Instead, it must be different language expressly designed to limit the way the arbitral controversy is to be settled, and thus to impose a restrictive condition on the award itself. To that effect, Puerto Rico doctrine permits judicial review of the law only where the parties have 'expressly' agreed that the *arbitral controversy must be decided*, or that the *award must be*

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[10] A search in the nationwide legal databases will reveal a multitude of generic choice-of-law clauses with virtually identical language.

rendered, in a manner that is "conformable to law" ("conforme a derecho").[11] See *Opinion, Petition* App. 16; *Labor Relations Bd. of P.R. v. Farm Credit Corp.*, 124 D.P.R. 846, 849, 24 P.R. Offic. Trans. [pending official compilation] (P.R. 1989); *Febus v. MARPE*, 135 D.P.R. 206, 213, 1994 P.R.-Eng. 909,606 (Westlaw) (P.R. 1994).[12]

If there is no explicit contractual language thus limiting the manner in which the arbitral controversy must be settled, Puerto Rico law restricts review of an award to grounds very similar to those set forth in sections 10 and 11 of the FAA. See P.R. Laws Ann., Tit. 32, §3222; P.R. Laws Ann., Tit. 4, Rule 8.20. The relevant distinction is exemplified by *Febus v. MARPE, supra*. In *Febus*, the contract provided that "[t]he award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction [...]." Referring to this "in accordance with applicable law" clause, the Puerto Rico Supreme Court held that "[t]he parties did not stipulate that the decision would conform to law. In these circumstances, we conclude it did not have to conform to law." *Febus*, 135 D.P.R. at 215, 1994 P.R.-Eng. 909,606 at page 4; *See also, Labor Relations Bd. of P.R. v. Farm Credit Corp., supra*, 124 DPR at 849 (1989) (Puerto Rico courts can review an award for legal mistakes

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[11] The Spanish "conforme a derecho" is sometimes translated as "in accordance with the law" or "according to law."

[12] This doctrine limits the decisional power of the arbitrator, because since the parties have agreed that the award must conform to law, 'non-conformance' would exceed the arbitrator's "fixed sphere of action." *Rivera v. Samaritano & Co.*, 108 DPR 604, 609, 8 P.R. Offic. Trans. 640, 644 (P.R. 1979). The doctrine had its onset in *Labor Relations Bd. of P.R. v. N.Y. & P.R. S/S Co.*, 69 DPR 782, 69 PRR 730 (1949), which adopted it from U.S. state court decisions reflected in *Williston on Contracts* (Rev. Ed. 1929). *Id.*, 69 DPR at 801-802. Even the pre-FAA common law doctrine on which it was based demanded terms explicitly requiring the arbitrators to decide according to law. See Wesley Sturges, *A Treatise on Commercial Arbitration and Awards* 793-97 (1930).

only with an "express provision" that the controversy must be settled in accordance with the law.)

All of the Puerto Rico decisions cited in the *Petition* that permitted expanded review involve the explicit language required by Puerto Rico case law. See *Labor Relations Bd. of P.R. v. Administrative Bd. of the Ponce Munic. Pier*, 122 P.R. Offic. Trans. 303, 310 (P.R. 1988) (*Petition* at 18) ("the decision [...] shall be according to law"); *Unión de la Industria Licorera de Ponce v. Destilería Serrallés, Inc.*, 116 P.R. Offic. Trans. 426, 430 (P.R. 1985) (*Petition* at 18) ("the award [...] shall be final and binding [...] as to findings of fact but not as to conclusions of law"); *Rivera v. Samaritano & Co.*, 8 P.R. Offic. Trans. 640, 644 (P.R. 1979) (*Petition* at 19) ("matters [...] to be settled according to law"); *S.I.U. de Puerto Rico v. Otis Elevator Co.*, 105 P.R. Offic. Trans. 1156, 1163 (P.R. 1977) (*Petition* at 19) ("[agreement] expressly provides that the award should be conformable to law.") The *Petition* is therefore premised on an incorrect representation of Puerto Rico law.

PRTC seems to suggest that its proffered interpretation of local law is not only correct, but settled beyond contention. PRTC thus refers to this issue as "a well established principle of the law of Puerto Rico" (*Petition* at 7) and a "longstanding convention in the law of Puerto Rico" (*Petition* at 10). Referring to Clause 4(b) of the contract, it alleges that "[u]nder longstanding jurisprudence of the Supreme Court of Puerto Rico, the inclusion of language like that [...] has been construed to mean that expanded judicial review of arbitral awards is available [...]." (*Petition* at 18). It describes this clause as "a specific choice-of-law provision requiring compliance with Puerto Rico law" (*Petition* at 9), and subjectively represents that "[t]here is no doubt that PRTC expected expanded judicial review if an arbitration became necessary [...]" because such contract language "has traditionally been construed to permit such review."

(*Petition* at 11). Such persistent statements betray the flawed nature of PRTC's argument. If PRTC truly wished to expand judicial review of the award, nothing prevented it from using the express conventional language required by Puerto Rico law, such as "the award shall be conformable to law," or "the controversy shall be decided according to law." The conspicuous exclusion of such language from PRTC's contract of adhesion bespeaks its true intent not to expand judicial review.

Needless to say, the Supreme Court of Puerto Rico has never held that generic choice-of-law language such as contained in Clause 4(b) of PRTC's contract can be deemed a substitute for the express conventional language required by local case law to permit review of the law underlying an arbitral award. To the contrary, the *Febus* decision cited above conclusively supports the opposite view. PRTC therefore would not have been entitled to expanded judicial review of the award under Puerto Rico law even if its contract language had passed federal muster.

Given that generic language such as employed by PRTC has long been deemed insufficient to restrict the powers of the arbitrator or to expand judicial review,[13] PRTC has resorted to the argument that as drafter, it intended the language in the arbitration clause that provides that "[t]he Panel shall meet in Puerto Rico and apply the law of the Commonwealth of Puerto Rico" to officiate as the generic choice-of-law clause, thus somehow transforming the facially generic choice-of-law clause into an implicit expansion of judicial review. *Petition* at 17.

The above interpretation borders on the unintelligible. More importantly, it boils down to an issue of intent under Puerto Rico law that was not developed in the record. It is also demonstrably specious. While the generic "*Language*

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[13] See *Opinion*, *Petition* at App. 14-15.

and Law" Clause 4(b) stands by itself and would have been operative even absent an arbitration provision, Clause 17.2 is not generic, but specifically directed to the arbitration panel. The former identifies the law that will govern contract interpretation, and the latter identifies the law that will be applied in the resolution of contractual disputes. Neither requires that arbitral decisions conform to legal principles in order to be binding. Moreover, PRTC's reading of these clauses would suggest that the language in the arbitration clause providing that the disputes shall be "finally settled" under the AAA Rules, and that "the findings [of the arbitration award] shall be final and binding for both parties"[14] was specifically intended to function as meaningless surplusage. In this regard, any ambiguities would have been resolved under Puerto Rico law against PRTC as the party who drafted the contract. Article 1240 of the Puerto Rico Civil Code, P.R. Laws Ann., Tit. 31, §3478.

The court of appeals recognized the above, and held:

> "'We need not decide whether as a matter of local law this contract would be construed as providing for review of legal error, for we conclude that the FAA creates a presumption that the more limited FAA standard will govern, and the language here, as a matter of federal law, is insufficient to overcome the presumption."

Opinion, *Petition* at App. 16.

Accordingly, the entire foundation upon which the *Petition* is grounded - the representation that under Puerto Rico law PRTC's contract requires review of the award for legal error - is not only flawed and contested, but unresolved by the decision below. Since PRTC's alleged entitlement to expanded award review under Puerto Rico law is the sole

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[14] Clauses 17.2 (first paragraph) and 17.3, *Petition* at App. 3.

basis for its purported federal right to opt out of the FAA, the questionable nature of its state-law premise renders the federal issue an impossible subject for certiorari review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-1021

In The Supreme Court of the United States

PUERTO RICO TELEPHONE COMPANY, INC.,

Petitioner,

v.

U.S. PHONE MANUFACTURING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY MEMORANDUM

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LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner Puerto Rico Telephone Company ("PRTC") is a wholly owned subsidiary of Telecomunicaciones de Puerto Rico, Inc. ("TELPRI"). TELPRI is owned by Verizon Communications (52.1%), PRTA Holdings Corp. (28%), Popular Inc. (12.9%), and PRTC's employees (7%). PRTA Holdings Corp. is wholly owned by the government of the Commonwealth of Puerto Rico. In 1987, PRTC was wholly owned by the government of the Commonwealth of Puerto Rico. Respondent U.S. Phone Manufacturing Corporation ("U.S. Phone") is an independent corporate entity. No publicly held company owns 10% or more of the stock of U.S. Phone.

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Volt Information Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 2

STATUTES AND REGULATIONS:

Federal Arbitration Act, 9 U.S.C. §§ 1-16

Section 10, 9 U.S.C. § 10 1

Section 11, 9 U.S.C. § 11 1

INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY

The contract entered into between Puerto Rico Telephone Company, Inc. ("PRTC") at U.S. Phone Manufacturing Corporation ("U.S. Phone") compelling the arbitration of disputes contains two choice of law clauses. One is a generic application of the law of Puerto Rico which settles any conflicts of law question that might arise. Clause 17.2; App. 3. The second clause (Clause 4(b); App. 16) requiring that: "This Contract shall be governed by and interpreted in accordance with the laws of the Commonwealth of Puerto Rico," is not merely a redundancy. It is, instead, under Puerto Rico law an accepted and traditional statement, when applied to a contract's arbitration provision, reflecting an agreement that the parties have a right to expanded review of relevant questions of law following an arbitral award. The language also is not unclear, requiring that all the "laws" of Puerto Rico, including arbitration laws, apply to the interpretation and governance of the contract.

The court of appeals denied PRTC's request for enforcement of its rights under Clause 4(b), citing this Court's opinion in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), as authority. The court of appeals believes, apparently, that there is a magic word requirement inherent in the judicial review provisions of sections 10 and 11 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11, that is reinforced by *Mastrobuono*'s rejection of State arbitration law as a source of rights absent some kind of statement in the contract expressly applying the State provisions. Here, the court of appeals denied expanded review because the linguistic test distilled from *Mastrobuono* was not satisfied. The court of appeals surely muddled its analysis of the clauses and

failed to harmonize all of the provisions of the Contract, but in the end, very clearly concluded that *Mastrobuono* broadly preempts state laws allowing a state-law based departure from the FAA's default regime, and is a more powerful force in construing arbitration agreements than the countervailing rule that parties are "at liberty to choose the terms under which they will arbitrate." *Volt Information Servs., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989).

PRTC seeks this Court's review on the belief that the court of appeals has accorded its contractual intentions in the Contract as a whole insufficient force and has done so by misconstruing and over-reading this Court's holding in *Mastrobuono*. This outcome is driven by confusion and a lack of consistency among the courts of appeals in applying this Court's precedents in the area that has drawn extensive commentary and a call for additional enlightenment. *See Petition For A Writ of Certiorari* at 4, n.1; 16 n.4.

U.S. Phone has filed a brief in opposition to a writ. U.S. Phone does not deny the confusion reflected in the decisions of the courts of appeals or the commentary in the many journal articles. U.S. Phone's opposition to review is based upon two theories. First, they argue that PRTC is seeking review of dictum in the lower court's decision that is not appropriate for review and, indeed, that the First Circuit's decision in that regard was favorable to PRTC and not properly reviewed for that additional reason. Next, U.S. Phone disputes PRTC's contention that the law of Puerto Rico accommodates the conclusion that the language in Clause 4(b) embodies an intent to allow expanded review of the arbitral award. Moreover, according to U.S. Phone, other language in the contract conflicts with PRTC's

interpretation of Clause 4(b) and, therefore, the court below committed no error in defaulting to the FAA rule.

U.S. Phone's opposition misconstrues the First Circuit's holding and incorrectly reports the law of Puerto Rico. It does not advance sound reasons for denying PRTC's petition.

ARGUMENT IN REPLY

1. The holding of the court of appeals that is being challenged here is that local conventions allowing for expanded judicial review are irrelevant or an insufficient clear indication of the intent of the parties, following this Court's decision in *Mastrobuono*. App. 16. Put another way, the import of the court of appeals' decision is that the inclusion of language in a contract expressing a state law-based expectation of judicial review will be given no effect unless it conforms to some unarticulated linguistic standard. At the same time, Clause 4(b) is not merely a generic choice of law provision but is in full harmony with the generic provision and the Contract as a whole in directing courts and arbitrators to both the substantive law and the arbitration law that will "govern" all aspects of the Contract. The court of appeals' holding deprives the parties of the benefit of these provisions and is a product of the uncertainty engendered by *Mastrobuono*. It is worthy of review by this Court.

However imprecise the First Circuit may have been in expressing its opinion does not detract from ultimate consequences of its judgment. Certainly, the court of appeals agreed with PRTC's argument that expanded review is possible under some set of circumstances, App. 10-11, and

it is correct also, that there is a disagreement among the circuits on this point. But the court below went beyond those preliminary inquiries to hold PRTC failed to overcome a presumption against expanded review because its inclusion of the law of Puerto Rico and contractual expectations based upon it fell short of the *Mastrobuono* standard.

PRTC is not asking the Court to review dictum or a question of law on which PRTC prevailed.

2. U.S. Phone's dispute with the status of Puerto Rico law is a linguistic quibble. There is little doubt that a contract including an arbitration clause[1] and a separate requirement that any controversy must "be governed by and interpreted in accordance with the laws" of Puerto Rico, anticipates the possibility of expanded judicial review. U.S. Phone's brief in opposition admits the point although maintaining a theory that certain specific language is a more appropriate translation from the Spanish original Brief in Opposition at 8 n.11.

The fact is, however, that the language in Clause 4(b) of the Contract here is more than sufficient to capture the principle of expanded review and the cases make this very clear. The principal case on point decided by the Supreme Court of Puerto Rico is *Rivera v. Samaritano Co., Inc.*, 8 P.R. Offic. Trans. 640 (P.R. 1979).

Drawing from the tradition of both Spanish and Anglo-American jurisprudence, the Supreme Court of Puerto Rico emphasized the importance of effectuating the will of the

[1] In the contact between PRTC and U.S. Phone, the arbitration clause itself contemplates further judicial proceedings. *See* Clause 17.3 ("The arbitration procedure shall be a condition precedent to any right of legal action.").

parties. The Court concluded that an agreement by the parties to require the arbitration to be conducted "according to law" or "in accordance with law" demonstrated a clear expectation of expanded judicial review on questions of law. *Id.* at 644. The failure to honor this provision "renders the will of the parties ineffective." *Id.* at 644-45.

U.S. Phone's reliance on the outcome in *Febus v. MABRE Constr. Corp.*, 135 D.P.R. 206 (P.R. 1994), neither detracts from PRTC's point nor does it prove U.S. Phone's point. In *Febus*, the Arbitration clause contained additional language relied upon by the Puerto Rico Supreme Court that is not even arguably, included in the contract between PRTC and U.S. Phone. The *Febus* contract provided that the arbitrator's award was "final, unappealable and binding." *Id.* at 3-4. The court construed that language to preclude judicial review of any type, while at the same time, it reaffirmed the general rule that expanded review is expected when the award is "to be in accordance with law." *Id.* at 3-5.[2]

U.S. Phone's demand that different or some inflexibly specific wording is required to invoke the rule of Puerto Rico law is not reflected in any opinion of the Puerto Rico courts, nor is it consistent with the principles of expanded review honored under Puerto Rico law. No case holds, as U.S. Phone suggests, that the expanded review is off the

[2] U.S. Phone emphasizes language in Clause 17.2 that disputes will be "finally settled under FAA rules" and that the findings "should be final and binding for both parties." *See* Brief in Opposition at 11. These provisions do not suggest that Clause 17.3 contemplating expanded judicial review, and Clause 4(b) adopting the Puerto Rico rule are ousted. All provisions may be read harmoniously giving effect to each. And, nothing in Clause 17.2 parallels the language in the *Febus* contract providing that the award was "unappealable."

table unless there is some "explicit" agreement that the award must be "conformable to law." There simply is no magic word requirement under Puerto Rico law and the rule relied upon here by PRTC to demonstrate that it expressly contracted for expanded judicial review of arbitral awards is not subject to credible dispute.

3. The court of appeals effectively construed *Mastrobuono* to mean that there is only one valid way to contract for expanded judicial review or the application of State arbitration law, and that reliance on traditional local law shorthand, even where the contractual language is easily broad enough to reflect the intent of the parties, will not suffice. If the intent of the parties is the controlling factor, the First Circuit's demand for some technical inflexible approach gives unintended force to *Mastrobuono*, is not appropriate, and merits review by this Court.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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